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Innkeeper's Liability for Loss Suffered by Guests: *Drake v Dow*

*Drake v Dow*¹ is concerned with the issue of strict liability attributed to innkeepers for loss suffered by guests. The case also contains an entertaining foray into the historical development of the law of delict in Scotland and may therefore be of interest to legal historians.

A. THE FACTS

In 2004, Mr Drake resided at Castlehill Bed and Breakfast, Tain, for a period of eight months while waiting to be housed by a local authority. On the night of 30 August, while the proprietors of the B & B were away on holiday, Mr Drake's newly acquired computer was stolen from his room while he slept. The doors of the bedrooms within the establishment did not have locks.

Mr Drake maintained that the proprietors, Mr and Mrs Dow, were liable for his loss. They denied liability and the matter came before the sheriff on 20 January 2005. Mr Drake, who represented himself, made a claim that a delict "in the concept of onus" had been committed. When he was questioned by the sheriff as to the meaning of this statement, it transpired that Mr Drake was relying on *nautae caupones stabularii*, a particular part of the praetorian edict which, he claimed, had been received into Scots law. It rendered, amongst others, an innkeeper strictly liable for loss incurred in respect of property brought into the establishment. After considering this argument, the sheriff dismissed Mr Drake's claim on procedural grounds, for failure to set out the basis of his claim. In his judgment, the sheriff also raised doubts as to whether Mr Drake's claim was founded on sound law and remarked that, even if the claim had been properly set out, it would probably not have succeeded. The pursuer was ordered to pay the defenders' costs.

Mr Drake appealed against this decision to the sheriff principal. When the appeal was heard, the pursuer again maintained that he was relying on the edict *nautae caupones stabularii*. Citing a passage from Walker on *Delict*,² he argued that the edict had been received into Scots law and maintained that it applied, not only to inns, but also to lodging and boarding houses such as Castlehill B & B. In support of this extension of the edict, two cases were relied on: *May v Wingate*³ and *Watling v McDowall*.⁴ Reference was also made to a South African decision, *Gabriel and Another v Enchanted Bed and Breakfast CC*.⁵ The solicitor for the defenders contended that the edict only

1 2006 GWD 21-461. The sheriff principal's opinion is available at <http://www.scotcourts.gov.uk/opinions/SC3704.html>.

2 D M Walker, *The Law of Delict in Scotland*, 2nd edn, revised (1981) 291-295.

3 (1694) Mor 9236.

4 (1825) 4 S 86.

5 2002 (6) SA 597 (C). The pursuer also argued that, in any event, the proprietors of the establishment

applied to inns and not to lodging houses. Given the pursuer's length stay, it was claimed that he was a lodger and that the edict therefore did not apply.

The sheriff principal⁶ was unpersuaded by the pursuer's case. After analysing a statement from Erskine's *Institute*,⁷ on which the pursuer chiefly relied for his extension of the edict to lodging houses, along with a number of cases, the sheriff principal found against the pursuer, in the following words:⁸

In my opinion, whatever may have been the position in 1694 or 1800, it cannot be affirmed, in particular in the face of the reservation of the Court of Session in *Watling v McDowall* in 1825, that it is the law of Scotland that the proprietor of a bed and breakfast establishment may be liable under the Praetorian Edict to make good loss sustained by a guest (such as the pursuer in this case) while staying at that establishment. It follows in my view that the sheriff in the present case correctly dismissed the action on the basis that the pursuer's claim was not soundly based in law.

The sheriff principal then proceeded to give another reason for his decision.⁹ Section 1(1) of the Hotel Proprietors Act 1956 provides that only a hotel (as defined in that Act) is an inn;¹⁰ and since Castlehill B & B did not constitute a hotel within the Act, it could not be an inn.¹¹ The South African case was said to be irrelevant.¹² Although the sheriff principal had not read it, he felt that the situations were too disparate to compare, and that a similar claim against the proprietor of a bed and breakfast establishment in Scotland would probably have been defeated by section 1(1) of the Hotel Proprietors Act of 1956.¹³

B. ANALYSIS

In Roman law, the historical foundation of this aspect of Scots law, innkeepers (*caupones*) were the subject of a number of legal rules. Digest 4.9, entitled "Let seamen, innkeepers, and stable keepers restore what they have received", granted special praetorian remedies against these categories of people. It is generally agreed that this Digest title contains three distinct actions, introduced for different purposes.¹⁴

were negligent in not having locks on the doors. The sheriff principal refused to entertain this argument (para 18) on the basis that it was not raised before the sheriff, and was not adequately represented either in the stated case or in the grounds of appeal.

6 Sir Stephen S T Young QC.

7 Erskine, *Inst* 3.1.28.

8 Para 25.

9 Paras 26 and 27.

10 See the definition of a hotel in s 1(3) of this Act.

11 The logic of this argument is questionable: the classification of all hotels as inns in terms of this Act does not mean that all inns are hotels.

12 Para 28.

13 The relationship between this Act and edictal liability needs to be resolved.

14 See J Mackintosh, "*Nautae caupones stabularii*: special liabilities of shipmaster, innkeepers, and stablers" (1935) 47 JR 54; D S Bogen, "Ignoring history: the liability of ships' Masters, innkeepers and stablekeepers under Roman Law" (1992) 36 AJLH 326, for a survey of older literature and a credible account of the reasons for the amalgamation of these different actions into one Digest title. The Roman law position is also summarised in R Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1990) 514-520. The most recent account is R Zimmermann and P Simpson, "Strict liability", in K Reid and R Zimmermann (eds), *A History of Private Law in Scotland* vol 2 (2000) 569-583.

The first, the main subject of D 4.9, is the *actio de recepto* (*receptum* being the Latin term for a “guarantee”). This action rendered the innkeeper strictly liable for loss suffered¹⁵ by those staying in his inn, irrespective of whether he or his staff had been at fault. The Roman jurists rationalised the existence of this action in terms of the fear that the innkeeper and his staff or other guests could collude to rob an unsuspecting traveller, but this may have been an *ex post facto* justification. The basis of the strict liability imposed upon the innkeeper was a *guarantee* to keep the goods of his guests safe. There is evidence that the guarantee originally had to be expressly stated, but in classical Roman law it had come to be implied. Once the guarantee had become implied, the extent of the innkeeper’s liability was restricted to exclude cases of *vis maior*.¹⁶ It is important to note that this action did not dwell on the *cause* of the loss (apart from the exclusion of unforeseen and uncontrollable force). Its aim was to compensate the guest for loss in whatever manner it had been caused, whether by the innkeeper acting in collusion with his employees or by other guests. It should also be noted that the Roman jurists did not define an inn, nor did they make any statements on the length of stay. It may well be that a relatively short period of stay was implied in the semantics of the word “inn”, but this is not authoritatively settled.

The second action briefly mentioned in this Digest title is a variant of the action on theft (*actio furti* against *nautae, caupones, stabularii*).¹⁷ Its purpose was rather different from the *actio de recepto*, although the rationale for its introduction appears to have been similar if not identical. The innkeeper was held liable for double the value of any object stolen, irrespective of fault. Unlike the *actio de recepto*, the cause of the loss was of prime importance in this action. The victim had to prove that the object had been stolen by the staff of the innkeeper or by lodgers (as opposed to passing travellers for whom the innkeeper was not liable). A variation on this action dealt with damage caused by the staff of the innkeeper or lodgers living on the premises (the *actio damni* against *nautae, caupones, stabularii*).

The route whereby these actions were received into Scots law is bound up with the history of the European *ius commune*. Almost no research has been done on their fate in the medieval *ius commune* and their development until the sixteenth century when they were most likely received into Scots law.¹⁸ With that said, a few cautious remarks are possible. The famous Accursian gloss, which contains a reliable account of perceived medieval interpretation of Roman law, distinguished between the *actio de recepto*, based *quasi ex contractu*, and the *actio furti* against *nautae, caupones, stabularii*, based *quasi ex maleficio*.¹⁹ Although this has not been comprehensively explored, it would suggest that this distinction was generally maintained throughout the subsequent development of the *ius commune* until the sixteenth century. That the distinction between the two actions became embedded in the *ius commune* can, for example, be deduced from the famous seventeenth-century Roman-Dutch jurist, Johannes Voet who, in his *Commentarius ad Pandectas*, clearly followed the Accursian

15 Only the value of the object could be claimed.

16 Zimmermann, *Obligations* (n 14) 515.

17 Mainly treated in D.47.5.

18 Zimmermann & Simpson (n 14) at 570.

19 See the Accursian Gloss to the title of D.4.9 in *Corpus Glossatorum Iuris Civilis* vol 7 (Turin, 1969).

distinction.²⁰

The degree of lucidity in the *ius commune* as to the different foundations of these two actions makes the confusion of the Scottish institutional writers on the edict somewhat curious.²¹ Since these authors did not generally quote the sources on which their discussions were based, the precise origin of the confusion may never be uncovered. Fortunately, some of the groundwork has now been done. In a detailed survey of the reception of the edict into Scots law, Zimmermann and Simpson have demonstrated the complexities of the situation.²² It seems that the *actio de recepto*, based on quasi-contract, was received into Scots law rather than the action on theft against *nautae, caupones, stabularii*.²³ Although the institutional writers seem to have conceived of it as an action based on strict liability, their discussions focused on what at first sight appear to be situations that would have been dealt with by the other two actions (theft and destruction of property by the staff of the innkeeper or by guests). This should not be overstated, however, since it is difficult to envisage loss (as covered by the edict) occurring in another way. Owing to the quasi-contractual foundation of the action, it became more closely associated with the contract of deposit (especially given the wording of the edict) and much attention was paid to whether the property had been “received” and whether the innkeeper had tacitly consented to keeping the goods safe.²⁴ With the advent of the nineteenth century, however, restrictive tendencies are apparent in court decisions on the action.²⁵ Thus, for example, the courts seemed reluctant to grant this action in the absence of fault (an indication that it had all but become part of the contract of deposit), or where consent of the innkeeper could not be proved. Zimmermann and Simpson take a rather pessimistic view of the future of this action in Scots law. They argue that it has practically been fused with the contract of deposit and that statutory regulation of sea trade and hotels has severely limited its scope, effectively rendering it obsolete.²⁶

20 See Voet's discussion on D 4.9 and D 47.5 in J Voet, *Commentarius ad Pandectas*, translated by Percival Gane as *The Selective Voet: being selections on the Pandects*, 8 vols (1955-1958).

21 See, amongst others, Stair, *Inst* 1.9.5, 1.13.3, 1.44.4; Bankton, *Inst* 1.16.1; Erskine, *Inst* 3.1.28, Bell, *Prin* § 236; Bell, *Comm* I, 495; Hume, *Lectures* III, 417.

22 Zimmermann & Simpson (n 14). It seems, however, that this work was not placed before the court in *Drake v Dow*.

23 Zimmermann & Simpson (n 14) at 570-572. It is, however, necessary to be cautious about the authors' view that only one of the two actions was received into Scots law. In fact, a case could be made, especially from a careful reading of Stair, *Inst* 1.9.5 (*actio furti*?) and 1.13.3 (*in fine*) (*actio de recepto*?) that both actions were received. See specifically *Master of Forbes v Steil* (1678) Mor 9233. But I agree that the placing of the action directly following deposit suggests that the institutional writers faced structural complexities in classifying this action and eventually decided to group it with the contract of deposit. This choice had a profound impact upon the later development of the action.

24 This was probably a consequence of locating this action with the contract of deposit. This emphasised the element of “receiving” = deposit, rather than the guarantee upon which the Roman law action was founded.

25 Zimmermann & Simpson (n 14) at 572-578.

26 Zimmermann & Simpson (n 14) at 581-582.

C. ASSESSMENT

It is difficult to know whether the sheriff principal's decision was correct, since many of the salient legal points were left unexplored. The essence of the court's refusal to entertain the pursuer's claim was that it judged Castlehill B&B to be a lodging house (based on the pursuer's length of stay). The court was not convinced by Erskine's statement that the edict applied to such establishments, or by the precedent upon which he had relied. The sheriff principal also founded on the reservations expressed in later institutional writing and in modern commentaries on the applicability of the edict to lodging houses.

With that said, however, the issue of the lodging house remains somewhat baffling.²⁷ There is no evidence that the distinction between an inn and a lodging house ever featured in juristic discussion on the *actio de recepto* in Roman law. The only instance where the act of lodging seems to have been of importance was in the action on theft against *nautae, caupones, stabularii*. The reason was that the innkeeper was held liable for theft committed by his staff or by those who lodged there (*qui habitandi causa ibi sunt*).²⁸ He was not held liable for theft perpetrated by passing travellers.²⁹ The issue of the distinction between an inn and a lodging house seems to have arisen in Scots law during the period of the institutional writers when various extensions of the applicability of the Edict occurred.³⁰ It was first raised in *May v Wingate*³¹ (the case cited by Erskine), where the court decided, without giving reasons, that a lodging house was similar to an inn. Although the true reason for this decision will probably only come to light once the papers of the case are investigated, it can be pointed out that if the court argued upon a strictly "Roman" view of the *actio de recepto*, the decision would make perfect sense; for the nature of the establishment was irrelevant to an action based on strict liability. The purpose of this extension to lodging houses in *May v Wingate*, and the question of how the issues of the length of stay or the innkeeper's control over those who lodge with him relate to this exclusion, remain to be fully explored. It is a pity that these matters were not investigated more carefully.

Two further points deserve mention. First, the court's statement,³² "whatever may have been the position in 1694 or 1800, it cannot now be affirmed ... that it is the law of Scotland ...", is surprising and unexpected. One might have thought that the whole point of having a living "common law" in the institutional writers is to allow for an assessment of existing law in light of its history. The court's statement is not only

27 Compare T B Smith, *A Short Commentary on the Law of Scotland* (1962) 636.

28 D 47.5.1.6.

29 Walker, *Delict* (n 2) 291, relying on English case law, shows that the definition of an inn according to English law was linked to the notion of *delectus personae*. The proprietor of an inn admitted all members of the public, while that of a lodging house had a greater degree of choice over his clientele. Cf Bankton's description of the English law on this point in *Inst* I.16 at 380-382. There seems to be a link with D 47.5.1.6: "nam viatorem sibi eligere caupo vel stabularius non videtur nec repellere potest iter agentes: inhabitatores vero perpetuos ipse quodammodo elegit, qui non reiecit, quorum factum oportet eum praestare."

30 None of the institutional writers defines an inn nor does the matter seem to have provoked discussion in case law during the institutional period.

31 (1684) Mor 9233.

32 Para 25.

badly informed, but also undermines the historical continuum upon which modern Scots private law is founded.

Secondly, the court's decision not to take account of a recent South African case, *Gabriel v Enchanted Bed and Breakfast CC*,³³ deserves comment. Admittedly, the sheriff principal was unable to obtain a copy of the case, but the statement that³⁴ "...it is one thing to say that the Edict applies to a bed and breakfast establishment in South Africa and quite another to say that it applies to a similar establishment in Scotland ..." underplays the potential usefulness of South African case law.³⁵ Had the court taken the time to acquire the case in question, it would have seen that the facts were quite similar. The case dealt with the *actio de recepto* in the Roman sense as introduced into South African law via Roman-Dutch law. Strict liability based on the praetorian edict was confirmed in an earlier case, *Davis v Lockstone*.³⁶ Although South African law does not appear to have been influenced by the contract of deposit in the same way as in Scotland, there are sufficient parallels to be drawn from this mixed jurisdiction to warrant fruitful comparison.

Of course, the future of this action in Scots law depends on whether circumstances still warrant its existence. It does seem harsh to hold an innkeeper, or for that matter the proprietor of a B & B, strictly liable in respect of goods which are brought into the establishment and then damaged or stolen by a third party. On the other hand, Ulpian's rationalisation for the existence of the action, namely that "it is necessary generally to trust these persons and deliver property into their custody",³⁷ still holds true today. If the action is indeed based on some type of "guarantee" to keep the goods of the guests safe, then it may continue to have a place. Ultimately, the matter requires further investigation.

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³³ 2002 (6) SA 597.

³⁴ Para 28.

³⁵ Indeed the private law of the two jurisdictions has recently been the subject of detailed comparative study: see R Zimmermann, D Visser and K Reid (eds), *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa* (2004).

³⁶ 1958 AD 153.

³⁷ D 4.9.1.